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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID LAMONT SLATER, Defendant and Appellant.	E054158 (Super.Ct.No. RIF151549) OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge. Affirmed.

Jerry D. Whatley and Leslie Rose, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

The People charged defendant David Lamont Slater with two counts of assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2)) and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1). A jury found defendant guilty of one count of assault with a firearm (§ 245, subd. (a)(2)), one count of brandishing a weapon (§ 417), and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)).

On appeal, defendant first contends there is insufficient evidence to support his conviction for assault with a firearm because there is insufficient evidence to prove he loaded the gun with live ammunition or that he was aware of the facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone. Second, defendant contends the trial court erred in admitting into evidence a telephone conversation between a 911 operator and a witness, Alexandra Leone. Specifically, defendant contends the admission of this evidence violated his confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) because Leone was not available for cross-examination and her statements were testimonial.

We find no error and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

Defendant was involved in a dating relationship with Sherri Brightman for about a year. Defendant and Brightman ended their relationship around March 2009.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

In May 2009, Brightman was living in a house in Corona with her children, Terrand Johnson, age 23, S.T., age 16, R.T., age 15, and D., age 11. On May 4, 2009, S.T., R.T., and D. were inside the house by themselves. Around 3:30 p.m., R.T. heard defendant outside honking his car horn, cursing and yelling "'Sherri come outside right now. Sherri come outside.'" S.T. described defendant's yelling as "[l]oud enough to wake the dead," and his demeanor as "really angry." Defendant also attempted to open the front door of the house but failed because the door was locked.

R.T. called Johnson and told him that defendant was outside. Johnson returned to the house as defendant was leaving. Upon seeing Johnson, defendant called him a "'mark,'" and told him, "'I'm going to get you.'" Defendant then left. Johnson later told his sisters that he had seen defendant at the gas station earlier that day and that he and defendant had gotten into an altercation.

Defendant returned later that day[2] when Johnson and his girlfriend Leone were at the house with S.T., R.T. and D. S.T. and R.T. heard defendant yelling and honking his horn, and they told Johnson. Johnson and R.T. went outside to meet defendant, and S.T. and Leone watched them through the front door.

When Johnson went outside, defendant was near his car yelling for Brightman. Johnson asked defendant, "'Can you leave? Just leave us alone. My mom doesn't want to be with you. You guys aren't together. Just leave us alone. Stop bothering us.'" Johnson and defendant argued briefly, and defendant then walked over to his car. He sat

[2] Although R.T. estimated that an hour had elapsed between defendant's visits to the house, S.T. estimated only about 10 minutes had elapsed.

down inside the car, reached under the seat, and pulled out a gun. He loaded the bottom of the gun,[3] cocked the gun, pointed it at Johnson's head, and told Johnson that he was going to shoot him.

Upon seeing the gun, R.T., S.T. and Leone started screaming and crying, and Johnson feared for his life and the lives of his family members. Johnson testified that he knew there had to be bullets in the gun, "because [defendant] wouldn't just insert a magazine and pull it back to put a bullet in the chamber for no reason." Fearing that defendant might shoot one of his family members, Johnson tried to keep defendant focused on himself. Johnson told defendant, "'If you're going to shoot me, then shoot me.'" Defendant told Johnson, "'I want to fight you,'" and Johnson responded, "'If you want to fight me, then put down the gun.'" When Johnson told defendant that S.T. and Leone were going to call the police, defendant returned to the car, sat there for about 15 seconds, and then drove away. Johnson attempted to follow defendant in his own car but quickly lost sight of him.

S.T. attempted to call 911 when she first saw the gun. However, the call was disconnected and the operator did not call back until after defendant had already left. When the operator called back, she spoke with Leone and asked her various questions concerning the encounter.

The People sought to present a recording of the 911 conversation as evidence at trial. At pretrial, defendant objected to the evidence based on hearsay and *Crawford*

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[3] Although Johnson testified that defendant loaded the gun with a clip, S.T. was not sure whether defendant loaded the gun with a clip or bullets.

error. The trial court never made an express ruling on the objection. At trial, defense counsel objected to the evidence based on hearsay and foundational grounds. The trial court overruled the objection and allowed the evidence to be presented at trial.

A jury found defendant guilty of one count of assault with a firearm, one count of brandishing a weapon, and one count of possession of a firearm by a felon. Defendant was sentenced to 18 years four months in prison.

III. DISCUSSION

A. Whether There Is Sufficient Evidence to Support a Conviction for Assault with a Firearm

Defendant contends there is insufficient evidence to support his conviction for assault with a firearm, because there is insufficient evidence that he loaded the gun with live ammunition or that he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone.

1. Standard of Review

On appeal, we review the sufficiency of the evidence under the "substantial evidence" test. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Under that test, we must view the entire record "'in a light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence,'" by considering whether there was substantial evidence to support the conclusion of the trier of fact. (*Id*. at pp. 576-577.) If the circumstances reasonably justify the jury's finding, we may not reverse simply because the circumstances might

also be reasonably reconciled with a contrary finding. (*People v. Mosher* (1969) 1 Cal.3d 379, 395, disapproved on another ground as stated in *People v. Ray* (1975) 14 Cal.3d 20, 28-29.)

2. Whether There Is Sufficient Evidence that Defendant Loaded the Gun to Support a Conviction under Section 240

Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Accordingly, defendant argues that because there is insufficient evidence to prove the gun was loaded with live ammunition, there is insufficient evidence to prove he had the present ability to commit a violent injury upon the victims.

In support of this contention, defendant cites many cases that hold if a person points an unloaded gun at another, without any intent or threat to use it as a club or bludgeon, no assault is committed because there is no present ability to commit a violent injury on the person threatened in the manner in which the injury is attempted to be committed. (See, e.g., *People v. Sylva* (1904) 143 Cal. 62, 64.) However, those cases also demonstrate that when a properly instructed jury[4] convicts a defendant of assault with a firearm, it makes an implied finding that the gun was loaded (see, e.g., *People v. Orr* (1974) 43 Cal.App.3d 666, 672), and that if there is substantial evidence to support a reasonable inference that the gun was loaded, the court will uphold the jury's

[4] Defendant himself concedes the jury was properly instructed as to the elements required for assault with a firearm.

determination of the issue on appeal. (*Ibid*.; *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544-546.)

In determining whether a gun was loaded, the jury may infer "an implied assertion that the gun was loaded" from the defendant's acts and language. (*People v. Hall* (1927) 87 Cal.App. 634, 636.) In *People v. Montgomery* (1911) 15 Cal.App. 315, 316-317 (*Montgomery*), the court upheld the defendant's conviction for assault with a firearm because the defendant's acts and language supplied substantial evidence from which the jury could reasonably infer that the gun was loaded. In *Montgomery*, the victim and the defendant were working in a stable when they became involved in an altercation. (*Id*. at p. 317.) The defendant ran back to his home, returned with a gun, pointed the gun at the victim, and said, """I have got you now . . . ."" (*Ibid*.) When the victim yelled for help and telephoned the stable owner, the defendant hid near the stable with his gun. (*Id*. at pp. 317-318.) The stable owner managed to lead the defendant away. (*Id*. at p. 318.) Police found the defendant in his home later that night and retrieved his unloaded gun a few days later. (*Ibid*.) Despite the fact that the gun was found unloaded, the court concluded "all these facts and circumstances had a tendency to prove that the gun was loaded . . . ." (*Ibid*.) The court specifically noted the importance of several factors. First, the defendant had been angry with the victim both when he left the stable and when he returned with the gun. (*Ibid.*) Second, the defendant took the time to leave the stable, travel home, and retrieve the gun. (*Ibid*.) Third, the defendant's statement, "'I have got you now,'" would be meaningless if the gun had not been loaded. (*Id*. at pp. 318-319.)

The facts in *Montgomery* are substantially similar to the facts in this case. Like the defendant in *Montgomery*, defendant here was incredibly angry with his victims. S.T. testified that defendant appeared to be "really angry." Before his first visit to the house, defendant got into a heated argument with Johnson at a gas station. Defendant then drove over to the victim's house and proceeded to scream and curse until Johnson arrived. Also, like the defendant in *Montgomery*, defendant in this case left the scene of the dispute and returned with a gun. During his initial visit, defendant told Johnson that he was "going to get" him, left the house, and then returned in the car with a gun. During the second visit, defendant walked up to the house, argued with Johnson, went back to his car, and returned with the gun. Here, the evidence that the gun was loaded was even more compelling than that in *Montgomery*, because Johnson and S.T. actually saw defendant load a clip or magazine into the gun. The jury could reasonably infer that defendant did not leave the scene of the dispute to retrieve a gun with an empty clip or magazine.

Finally, the language used by the defendant in *Montgomer*y is similar to the language used by defendant in this case. First, as defendant left the house after his initial visit, he told Johnson he was going to get him. Just as it would have been meaningless for the defendant in *Montgomery* to say that he "got" the victim if his gun was unloaded, it would also be meaningless for defendant in this case to say that he was "going to get" Johnson with an unloaded gun. Second, defendant pointed the gun at Johnson's head and told Johnson he was going to shoot him. If defendant had been brandishing an unloaded gun, this statement would also be meaningless. (See also *People v. Mearse* (1949) 93

Cal.App.2d 834, 837 [holding that the defendant's statements of "'I am going to give it to you tonight,'" and "'Halt or I'll shoot,'" could support a reasonable inference that a gun was loaded].) Thus, defendant's language reasonably supports an inference that the gun had been loaded.

Defendant seems to suggest there is no substantial evidence to support the inference the gun was loaded because (1) no victim sustained any injury; (2) Johnson's challenge to defendant to shoot implied the gun was not loaded; (3) S.T.'s testimony was unreliable because she did not know whether defendant loaded the gun with a clip or bullets; and (4) neither Johnson nor S.T. could testify that the clip contained any live bullets. These arguments are without merit.

First, an assaulter does not need to inflict any injury upon his victim to be convicted of assault with a firearm. The plain language of section 240 requires that an assaulter make an attempt to inflict violent injury and have the present ability to inflict violent injury; it does not require that the assaulter actually cause any injury. (See *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1326 [holding that defendant was guilty of assault with a firearm even though no one sustained any injuries when "his actions were 'implied threats' in circumstances where someone could have been harmed"].)

Second, although a jury could have inferred the gun was not loaded from the fact that Johnson challenged defendant to shoot, that is not the only reasonable inference a jury could have made. Johnson testified that he tried to keep defendant's attention on himself throughout the encounter because he valued his family's safety over his own safety. Thus, a jury could have reasonably inferred that Johnson challenged defendant to

shoot precisely because he believed the gun was loaded and was trying to protect his younger sisters and his girlfriend. Having determined this inference in favor of the People to be reasonable, we are bound to accept it under the substantial evidence test. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

Finally, even if we disregard S.T.'s testimony that defendant loaded the gun, a substantial amount of properly admitted evidence supports the inference that the gun had been loaded. R.T.'s testimony, Johnson's testimony, and the 911 recording[5] all indicate that defendant went to his car, loaded the gun, cocked it, and armed it at Johnson. Thus, a reasonable jury could have concluded the gun had been loaded even if S.T.'s statements were excluded. (See *People v. Mosqueda*, *supra*, 5 Cal.App.3d at p. 544 [holding that the jury could reasonably infer the gun had been loaded when the defendant sat in his car, cocked the gun, and aimed it at the victim's head].) Moreover, in *Montgomery*, no one witnessed the defendant load the gun at all, yet the court still upheld his conviction for assault with a firearm. (*Montgomery*, *supra*, 15 Cal.App. at p. 318.)

3. Whether There Is Sufficient Evidence that Defendant Possessed the Requisite Mental State for Committing the Offense.

Defendant contends there is insufficient evidence to support his conviction for assault with a firearm because there is insufficient evidence to prove that he had the requisite mental state to commit the offense.

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[5] As discussed below, we have determined that the 911 recording was indeed properly admitted as evidence.

Assault is a general intent crime that "does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) In *People v. Hartsch* (2010) 49 Cal.4th 472, 507-508 (*Hartsch*), the court held that the defendant had the requisite mental state for assault with a firearm. In *Hartsch*, the victim heard a noise outside of her apartment. When she opened the door, "she saw a truck close by, with a passenger [the defendant] pointing a gun at her." (*Id.* at p. 484.) The court reasoned that the mere act of "pointing a gun at someone in a menacing manner is sufficient to establish the requisite mental state." (*Id*. at pp. 507-508.) The court held that evidence that the defendant had pointed a loaded gun at the victim in threatening circumstances was sufficient evidence from which a jury could infer the defendant knew his acts would "probably and directly result in a battery." (*Id*. at p. 507.)

The facts of this case are similar to the facts of *Hartsch*. As in *Hartsch*, defendant in this case was making noise outside of Brightman's house that induced the victims to come outside, and when the victims came outside, defendant got a gun from his car and pointed it at one of their heads. Here, moreover, defendant not only pointed the gun in a menacing manner, but he also threatened to "get" and "shoot" Johnson. We conclude the record provides substantial evidence from which a jury could have reasonably inferred that defendant knew his acts would "probably and directly result in a battery." (*Hartsch*, *supra*, 49 Cal.4th at p. 507.)

B. Whether the Admission of the 911 Recording Violated Defendant's Right to Confrontation

Defendant contends the trial court erred in admitting into evidence a recording of a telephone conversation between Leone and a 911 operator. Specifically, defendant contends the admission of this evidence violated his right to confrontation because Leone was not available for cross-examination and her statements on the 911 tape were testimonial.

"The confrontation clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' (U.S. Const., 6th Amend.)" (*People v. Cooper* (2007) 148 Cal.App.4th 731, 740 (*Cooper*).) In *Crawford, supra,* 541 U.S. at p. 68, the United States Supreme Court held that, while testimonial hearsay evidence is subject to Sixth Amendment scrutiny, nontestimonial hearsay evidence is not subject to such scrutiny. Thus, the court in *Cooper* held that, while testimonial hearsay may be presented only when the witness is available for cross-examination, nontestimonial statements may be presented subject to state hearsay law even when the witness is unavailable. (*Cooper, supra,* at p. 740.)

1. Standard of Review

We review matters involving the admissibility of evidence for abuse of discretion. (*People v. Griffen* (2004) 33 Cal.4th 536, 577, disapproved on another point in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) If we find that the trial court did abuse its discretion and allowed evidence in violation of the confrontation clause, the defendant's

conviction cannot be affirmed unless the error was harmless beyond a reasonable doubt. (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225 (*Mitchell*).)

2. Whether Defendant Forfeited His Confrontation Clause Objection by Failing to Reassert It

The People contend that defendant forfeited his confrontation clause objection because he failed to reassert the objection at trial. In *People v. Heldenburg* (1990) 219 Cal.App.3d 468, 474 [Fourth Dist., Div. Two] the court held: "'"[W]here the court, through inadvertence or neglect, neither rules nor reserves its ruling . . . the party who objects must make some effort to have the court *actually rule*. If the point is not pressed and is forgotten, he may be deemed to have waived or abandoned it, just as if he had failed to make the objection in the first place." [Citations.]' [Citations]."

Because defendant made no effort to obtain a final ruling on his *Crawford* objection,[6] we agree with the People's contention that the objection was waived. (See *People v. McNeal* (1958) 160 Cal.App.2d 446, 454 [holding that a defendant could not introduce evidence on appeal because he failed to obtain a final ruling on the evidence at trial].) Nonetheless, we will exercise our discretion to consider the issue on its merits. (See *People v. Chaney*, *supra*, 148 Cal.App.4th at p. 780.)

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[6] Although defendant did object to the tape based on hearsay and foundational grounds at trial, a hearsay objection will not preserve a *Crawford* objection on appeal. (See *People v. Chaney* (2007) 148 Cal.App.4th 772, 779-780.)

3. Whether the 911 Recording Contained Testimonial Hearsay Statements

In support of his contention that the 911 recording is testimonial, defendant cites *Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*), which establishes a test for determining whether a statement is testimonial: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid*., fn. omitted.) Defendant argues that this test mandates a finding that the 911 recording was testimonial because "[t]he emergency was over" at the time the call was made and the primary purpose of the call was "to establish or prove past events potentially relevant to later criminal prosecution." Finding *Davis* distinguishable, we disagree.

In *Davis*, the police were called to investigate a domestic disturbance. (*Davis*, *supra*, 547 U.S. at p. 819.) The victim claimed that "'nothing was the matter.'" (*Ibid*.) The officers questioned the victim in a separate room, keeping the defendant away from her by force. (*Id*. at pp. 820-821.) As the court considered whether the statements made during this interview were testimonial, it noted that the investigating officer himself testified he was attempting to investigate past criminal conduct. (*Id*. at p. 830.) Further, the officers did not observe any signs of an ongoing emergency; the victim claimed nothing was wrong, the officers did not observe any forms of violence, and the officers were present at the scene to control the defendant. (*Id*. at pp. 829-830.)

We find *Davis* distinguishable because, unlike the defendant in *Davis*, defendant in this case was not being controlled by the police when the statements were made. Rather, defendant was presumably driving the streets of Corona with a loaded gun in his possession. Consequently, we find this case analogous to *People v. Brenn* (2007) 152 Cal.App.4th 166 (*Brenn*). In *Brenn*, the defendant and the victim were residing in a home for the mentally ill when the defendant stabbed the victim. (*Id*. at pp. 169-170.) The victim ran to another house in the neighborhood and called 911. (*Ibid*.) The victim claimed he wanted to press charges against the defendant, and the 911 operator questioned the victim about "who and where he was, what he was calling about, where the suspect was located, what the suspect looked like, and what he might be expected to do." (*Id*. at pp. 171-172, 177.) The court explicitly rejected the argument that because the victim had escaped the presence of the defendant, the primary purpose of the call was not to deal with an ongoing emergency. (*Id.* at p. 177.) Rather, when the court considered the types of questions the dispatcher had asked the victim in light of the fact that the defendant was free, unpredictable, and armed, it determined the dispatcher had been "eliciting information in an attempt to assess the present situation and help [the victim] and the responding officers, not secure a conviction in a court of law." (*Ibid*.)

As in *Brenn*, the primary purpose of the 911 call was to deal with an ongoing emergency. Although defendant had left the premises and the victims claimed to be fine, the People properly note that the emergency had not ended: "Although 16-year-old [S.T.] apparently thought the emergency was over when the 911 operator called back it is clear the 911 operator understood the contrary reality—that a fleeing gunman presented

an on-going emergency, not only to the victims in this case but also to the community at large and to responding officers." Further, like in *Brenn*, the dispatcher in this case asked for no more than a description of who and where the victims were, what they were calling about, where the suspect was located, what the suspect looked like, and what he might be expected to do. Since this call only contains answers to questions that would help officers deal with the ongoing emergency of having an armed suspect on the loose, we conclude that it was nontestimonial.

Our conclusion is also supported by *Cooper*, in which the court held that "Interrogation during a 911 call is not testimonial because it is not designed primarily to establish or prove some past fact but to describe current circumstances requiring police assistance." (*Cooper*, *supra*, 148 Cal.App.4th at p. 742, fn. omitted.) Although the disputed evidence involved the dispatcher calling back after the initial call was disconnected, it was still a 911 call. Thus, following *Cooper*, we conclude the 911 tape was nontestimonial and its admission did not violate the defendant's right to confrontation. (See also *People v. Corella* (2004) 122 Cal.App.4th 461, 468 [holding that statements made during a 911 call were not testimonial because "[n]ot only is a victim making a 911 call in need of assistance, but the 911 operator is determining the appropriate response. The operator is not conducting a police interrogation in contemplation of a future prosecution."].)

4. Whether, If the Trial Court Had Erred, the Error Would Have Been Harmless Beyond a Reasonable Doubt

Assuming, for the sake of argument, that the trial court had erred in admitting the evidence, we conclude the error would have been harmless beyond a reasonable doubt.

In *Mitchell, supra,* 131 Cal.App.4th at p. 1226, the defendant was involved in a robbery. Police responded to the robbery and their response was recorded on a dispatch tape. (*Ibid*.) The trial court allowed the prosecution to present the tape as evidence at trial. (*Ibid*.) On appeal, the defendant challenged the admission of the tape under *Crawford*. (*Mitchell*, *supra,* at p. 1226.) The court noted that the tape did not provide any new evidence; it merely summarized the abundance of properly admitted evidence that was also presented at trial. (*Ibid*.) Thus, the court concluded the admission of the evidence had played only a minor role in the prosecution's case and as such had been harmless beyond a reasonable doubt. (*Ibid*.)

Like the court in *Mitchell*, we conclude that, had there been error, it would have been harmless beyond a reasonable doubt. Like the tape in *Mitchell*, the 911 recording in this case did not supply any new evidence. Everything that Leone said about the incident matches the testimonies of Johnson, S.T. and R.T. The properly admitted testimonies of three eye witnesses provided the same information as in the 911 recording. Thus, the recording merely summarized the abundance of evidence presented at trial. We conclude the admission of the 911 recording played only a minor role in the prosecutions' case, and as such, was harmless beyond a reasonable doubt.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MILLER
J.